

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

STATE OF OKLAHOMA,)	
)	
Plaintiff,)	
)	
v.)	Case No. 05-cv-329-GKF(SAJ)
)	
TYSON FOODS, INC., et al.,)	
)	
Defendants.)	

**STATE OF OKLAHOMA'S RESPONSE IN OPPOSITION TO
THE CARGILL DEFENDANTS' MOTION FOR PROTECTIVE ORDER
REGARDING THE STATE'S 30(b)(6) DEPOSITION NOTICE**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), respectfully requests that the Cargill Defendants' Motion for Protective Order regarding the State's 30(b)(6) deposition notice [DKT #1257] be denied for the reasons that follow.¹

A. The Cargill Defendants bear the burden of demonstrating that the discovery sought by the State in its 30(b)(6) deposition notice is irrelevant

The parameters of permissible discovery under Fed. R. Civ. P. 26 are well-defined. "Parties may obtain discovery regarding any manner, not privileged, which is relevant to the claim or defense of any party Relevant information need not be admissible at trial if the discovery appears to be reasonably calculated to lead to the discovery of admissible evidence." Fed. R. Civ. P. 26(b)(1).

¹ Because many of the issues are interrelated, the State incorporates by reference the arguments made in its Motion to Compel [DKT # 1244] and Reply [DKT #1274].

"Relevancy is broadly construed, and a request for discovery should be considered relevant if there is 'any possibility' that the information sought may be relevant to the claim or defense of any party. A request for discovery should be allowed 'unless it is clear that the information sought can have no possible bearing' on the claim or defense of a party." *Goodyear Tire & Rubber Co. v. Kirk's Tire & Auto Servicenter of Haverstraw, Inc.*, 211 F.R.D. 658, 663 (D. Kan. 2003) (citation omitted). "When the discovery sought appears relevant on its face, the party resisting the discovery has the burden to establish the lack of relevance by demonstrating that the requested discovery (1) does not come within the broad scope of relevance as defined under Rule 26(b)(1), or (2) is of such marginal relevance that the potential harm the discovery may cause would outweigh the presumption in favor of broad disclosure." *Id.* (citation omitted).

B. The State is entitled to inquire about matters occurring prior to 2002

As explained in the State's Reply [DKT #1274], the Cargill Defendants' effort to restrict the temporal scope of the 30(b)(6) deposition to a mere 5 years is improper for at least the following reasons: First, it ignores the fact that the parties in connection with written discovery have met and conferred regarding temporal issues, and, while not all issues were resolved, the Cargill Defendants now appear willing to produce at least certain categories of documents dated prior to 2002. As to these categories (*e.g.*, grower file information, flock evaluation reports, environmental audits, documents relating to breeder farms), it makes no sense that the Cargill Defendants now seek to back-track and revive their arbitrary 2002 discovery limitation.

Second, the State submits that the Cargill Defendants are attempting to give the Court's July 6, 2007 Order [DKT #1207] an improperly and implausibly narrow reading. In that order, p. 3, the Court "require[d] Defendants to produce documents relevant to the corporate knowledge of the Cargill Defendants of detriment to the environment from the application of poultry waste

to the ground without any limit as to the date of the documents" (Emphasis added.)

Inasmuch as the detriment to the environment from poultry waste is the core issue in this case, it should come as no surprise that the majority of the topics in the deposition notice refer or relate to some aspect of corporate knowledge on this issue. *See* State's Motion to Compel, Exs. 1 and 2 [DKT #1244]. They are clearly "relevant to" this issue.²

Third, contrary to the Cargill Defendants' suggestion, the Court's order did not require the State to come forward with evidence of the relevancy of discovery into matters predating 2002 (or any other year for that matter). Rather, the Court's order, p. 3, simply required the parties to notify the Court of any unresolved issues which the Court may set down for briefing or testimony.

Finally, the Cargill Defendants' effort to set down a unilateral and arbitrary discovery cut-off of 2002 is not only inconsistent with this Court's order, but it also inconsistent with principles of relevancy set out in Fed. R. Civ. P. 26(b)(1) and the caselaw interpreting that Rule. There is

² For example, Topics 3, 4 and 5 go, *inter alia*, to matters pertaining to the inputs by the Cargill Defendants to the poultry growing process that result in the poultry waste having the chemical and biological composition that it does, and thus are an integral part of corporate knowledge as to the environmental detriment from poultry waste. Topic 9 similarly goes, *inter alia*, to the issue of the chemical and biological composition of the poultry waste. Topics 6 through 8, 10 and 11 go, *inter alia*, to matters pertaining to the quantity of poultry waste generated, and thus are also an integral part of corporate knowledge as to the environmental detriment from poultry waste. Topics 12, 13, 20, 22 through 28, and 30 through 33 go, *inter alia*, to matters pertaining to the handling of poultry waste, and thus are another integral part of corporate knowledge as to the environmental detriment from poultry waste. Topics 14, 15, 21 through 23, 26 through 28, 30 through 33, and 35 go, *inter alia*, to matters pertaining to the run-off / release of poultry waste, and thus are yet another integral part of corporate knowledge as to the environmental detriment from poultry waste. And Topics 16 through 19, 22, 23, 26 through 28, 30 through 33, and 35 go, *inter alia*, to matters pertaining to the environmental effects of poultry waste, and thus are still another integral part of corporate knowledge as to the environmental detriment from poultry waste. The Cargill Defendants are attempting to parse the language of the Court's order too finely in an effort to avoid complying with legitimate discovery.

simply no basis whatsoever for an arbitrary 2002 discovery cut-off, and the Cargill Defendants have offered none.

In sum, the Cargill Defendants' Motion with respect to temporal scope should be denied.

C. The State is entitled to inquire about alternative uses of poultry litter (*i.e.*, uses other than in the context of land application)

Topic 24 of the State's 30(b)(6) deposition notice reads: "Alternative methods for the use or disposal of poultry waste." The Cargill Defendants have objected to the relevancy of this topic of inquiry. *See* Cargill Defendants' Motion, pp. 18-20. This topic of inquiry, however, is plainly relevant to the issue of whether there may exist options for handling poultry waste that would not have the same environmental detriment as land application. The Cargill Defendants' Motion with respect to Topic 24 should therefore be denied.

D. The State is entitled to inquire about the behavioral characteristics and environmental effects of constituents of poultry waste where that knowledge is derived from operations other than poultry operations

The Cargill Defendants have inexplicably objected to the relevancy of inquiry into the behavioral characteristics and environmental effects of constituents found in poultry waste where such knowledge was not derived from poultry operations.³ Such inquiry is relevant to demonstrating the fate, transport and effect of these constituents. It does not matter where the Cargill Defendants obtained this knowledge. The Cargill Defendants' Motion with respect to these topics should therefore be denied.

³ Citing to *Steil v. Humana Kansas City, Inc.*, 197 F.R.D. 442, 444 (D. Kan. 2000), the Cargill Defendants assert that these topics are "not delineated with the particularity necessary for the Cargill Defendants to feasible [sic] designate a deponent to fully testify." *See* Cargill Motion, p. 19. *Steil* is easily distinguishable. The basis for the finding of a lack of particularity referenced in *Steil* was "that the listed areas of inquiry would 'include, but not be limited to' the areas specifically enumerated in the notice." *Steil*, 197 F.R.D. at 444 (citing to *Reed v. Bennett*, 193 F.R.D. 689, 692 (D. Kan. 2000)). Such language is not used in this sense in the topics in the State's 30(b)(6) deposition notice.

E. The State is entitled to inquire about matters pertaining to releases and run-off

Topics 13, 14, 16, 18 and 21 of the State's 30(b)(6) deposition notice read:

13. The amount of and specific locations, past and present, where poultry waste generated by each and all of your poultry growing operations has been spread on land within the IRW.

14. Knowledge or awareness of the run-off / discharge / release of poultry waste (or any constituents thereof) from land or locations on which poultry waste generated by your poultry growing operations within the IRW has been stored, spread on or disposed of.

* * *

16. The environmental and human health effects / impacts of run-off / discharge / release of poultry waste (or any constituents thereof) from land or locations within the IRW on which poultry waste generated by your poultry growing operations has been stored, spread on or disposed of.

* * *

18. The efforts undertaken by you, directly or indirectly, to evaluate and / or quantify any environmental and health effects / impacts of run-off / discharge / release of poultry waste (or any constituents thereof) from land or locations within the IRW on which poultry waste generated by your poultry growing operations has been stored, spread on or disposed of.

* * *

21. The locations(s) where poultry waste (or any constituents thereof) generated by your poultry growing operations that has run-off / been discharged / been released from land within the IRW has come to be located.

The basis for the Cargill Defendants' objection to inquiry on these highly relevant topics, all of which relate to their knowledge concerning their operations in the Illinois River Watershed, is the assertion that the State has not told the Cargill Defendants the factual details of how their conduct violates the law. This is incorrect. The State has provided the Cargill Defendants extraordinarily detailed interrogatory responses setting out information about releases and run-off of poultry waste. *See, e.g.,* Supplemental Objections and Responses to Cargill, Inc.'s First

Set of Interrogatories, Responses 2, 9, 12, 13 & 15 (attached as Ex. 2 to DKT #1272); *see also* Response of State of Oklahoma to Motion for Sanctions of the Cargill Defendants (DKT #1272). Even without the benefit of the State's detailed information, it is clearly a topic on which the Cargill Defendants have ample knowledge. For example, on September 10, 2004, in an open letter published in the newspaper, Defendant Cargill Turkey Production LLC joined other Defendants to this action in stating: "Our Scenic River Watersheds are examples of environments that include many sources of nutrients that potentially impact the health of the rivers and streams that lie within them. We are prepared to do our part to take care of the poultry portion of the nutrient equation." Ex. 1 (emphasis added).

Simply put, the Cargill Defendants' objections on this matter are nothing but a desperate, unfounded ruse to avoid answering questions on core issues in this case. It should not be tolerated. These topics go directly to conduct in the Illinois River Watershed. The Cargill Defendants are wasting both the Court's and the State's time, and severely prejudicing the State's trial preparation. The Cargill Defendants' Motion with respect to Topics 13, 14, 16, 18 and 21 should be denied.

F. The State is entitled to inquire about the Third Amended Complaint and on any differences between the Cargill Defendants' poultry growing operations in Oklahoma and Arkansas

Topic 32 of the State's 30(b)(6) deposition notice reads: "The allegations made in paragraph 3 of the Third Party Complaint [DKT. #80]." Paragraph 3 states:

Any contribution from poultry litter applications by Third Party Plaintiff or the poultry farmers with whom they contract to the overall loading of phosphorous, nitrogen or any other purportedly harmful constituent in the IRW (which contribution is denied) would be insignificant in comparison to the contributions of Third Party Defendants and the thousands of other persons, corporations and political subdivisions operating in the IRW.

While it acknowledges that the Cargill Defendants did not join in that Third Party Complaint, the State is entitled to the Cargill Defendants' views as to whether it agrees with the (erroneous) assertion by the other Defendants that those Defendants are insignificant contributors (vis-à-vis others) to constituents of concerns in the Illinois River Watershed.

Topic 34 of the State's 30(b)(6) deposition notice reads: "Differences in the method, manner, direction or management of your poultry growing operations in Oklahoma compared to Arkansas within the IRW." The Cargill Defendants object to the relevancy of this topic on the ground that "the Cargill Defendants have no poultry-growing operations in the IRW in Oklahoma, only in Arkansas. There thus are no 'differences' to discuss" Cargill Motion, p. 23. In making this objection, the Cargill Defendants are attempting to play word games, which should not be countenanced by the Court. The Cargill Defendants have ignored the fact that the State defined "your poultry growing operations" in the 30(b)(6) notice as "any poultry growing facility where birds owned by you are being produced or grown." Thus, while the Cargill Defendants may not own any poultry growing operations located in the Oklahoma portion of the Illinois River Watershed, they most certainly do own birds that are raised by contract growers located in the Oklahoma portion of the Illinois River Watershed. The State is clearly entitled to inquire of the Cargill Defendants of how the manner, direction and management of the operations in the two states differ (if at all), since conduct throughout the watershed is relevant to the State's claims.

The Cargill Defendants' Motion with respect to Topics 32 and 34 should therefore be denied.

G. The State is entitled to inquire about the facts, reasons and bases of the Cargill Defendants' responses to the State's requests for admission

Topic 35 of the State's 30(b)(6) deposition notice reads: "The facts, reason and basis supporting or relied on by you for responses made to the State's Requests for Admission served on or about April 20, 2007." The Cargill Defendants assert that this information is protected by the attorney work product doctrine, and therefore they are entitled to a protective order precluding discovery of this information in the 30(b)(6) deposition. The Cargill Defendants are wrong. The facts and basis underlying responses to requests for admission are a legitimate area for discovery. *See, e.g., McCulloch v. Hartford Life and Accident Insurance Co.*, 223 F.R.D. 26, 32-33 (D. Conn. 2004) (allowing follow-up deposition of corporate designee regarding factual basis of its denials of plaintiff's requests for admissions); *Aequitron Medical, Inc. v. CBS, Inc.*, 1995 WL 406157, *3 (S.D.N.Y. July 10, 1995) ("Defendants are also instructed to designate an employee for a Rule 30(b)(6) deposition to identify . . . the bases for defendants' denials as to plaintiff's Request for Admissions . . ."). The Cargill Defendants' Motion with respect to Topic 35 should therefore be denied.

Conclusion

For the reasons set forth above, the Cargill Defendants' Motion for Protective Order regarding the State's 30(b)(6) deposition notice [DKT #1257] should be denied.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628
 Attorney General
 Kelly H. Burch OBA #17067
 J. Trevor Hammons OBA #20234
 Tina Lynn Izadi OBA #17978
 Assistant Attorneys General
 State of Oklahoma
 313 N.E. 21st St.
 Oklahoma City, OK 73105
 (405) 521-3921

/s/ M. David Riggs

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Douglas A. Wilson OBA #13128
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
Riggs, Abney, Neal, Turpen,
Orbison & Lewis
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

James Randall Miller, OBA #6214
222 S. Kenosha
Tulsa, OK 74120-2421
(918) 743-4460

Louis Werner Bullock, OBA #1305
Miller Keffer Bullock Pedigo LLC
110 West 7th Street, Suite 707
Tulsa, OK 74119-1031
(918) 584-1031

David P. Page, OBA #6852
Bell Legal Group
P. O. Box 1769
Tulsa, OK 74101
(918) 398-6800

Frederick C. Baker
(admitted *pro hac vice*)
Lee M. Heath
(admitted *pro hac vice*)
Elizabeth C. Ward
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
Motley Rice, LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
Motley Rice, LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1676

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick
Motley Rice, LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2007, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

Frederick C Baker fbaker@motleyrice.com, mcarr@motleyrice.com;
fhmorgan@motleyrice.com

Michael R. Bond michael.bond@kutakrock.com, amy.smith@kutakrock.com

Vicki Bronson vbronson@cwlaw.com, lphillips@cwlaw.com

Paula M Buchwald pbuchwald@ryanwhaley.com

Louis Werner Bullock LBULLOCK@MKBLAW.NET, NHODGE@MKBLAW.NET;
BDEJONG@MKBLAW.NET

Gary S Chilton gchilton@hcdattorneys.com

Robin S Conrad rconrad@uschamber.com

W A Drew Edmondson fc_docket@oag.state.ok.us, drew_edmondson@oag.state.ok.us;
suzy_thrash@oag.state.ok.us.

Delmar R Ehrich dehrich@faegre.com, etriplett@faegre.com; ; qsperrazza@faegre.com

John R Elrod jelrod@cwlaw.com, vmorgan@cwlaw.com

Fidelma L. Fitzpatrick ffitzpatrick@motleyrice.com

Bruce Wayne Freeman bfreeman@cwlaw.com, lclark@cwlaw.com

D. Richard Funk rfunk@cwlaw.com

Richard T Garren rgarren@riggsabney.com, dellis@riggsabney.com

Dorothy Sharon Gentry sgentry@riggsabney.com, jzielinski@riggsabney.com

Robert W George robert.george@kutakrock.com, sue.arens@kutakrock.com;
amy.smith@kutakrock.com

James Martin Graves jgraves@bassettlawfirm.com

Tgrever@lathropgage.com

Jennifer Stockton Griffin jgriffin@lathropgage.com

John Trevor Hammons thammons@oag.state.ok.us, Trevor_Hammons@oag.state.ok.us; Jean!
_Burnett@oag.state.ok.us

Lee M Heath ! lheath@motleyrice.com

Theresa Noble Hill thillcourts@rhodesokla.com, mnave@rhodesokla.com

Philip D Hixon phixon@mcdaniel-lawfirm.com

Mark D Hopson mhopson@sidley.com, joraker@sidley.com

Kelly S Hunter Burch fc.docket@oag.state.ok.us, kelly_burch@oag.state.ok.us;
jean_burnett@oag.state.ok.us

Tina Lynn Izadi; tina_izadi@oag.state.ok.us

Stephen L Jantzen sjantzen@ryanwhaley.com, mantene@ryanwhaley.com;
loelke@ryanwhaley.com

Bruce Jones bjones@faegre.com, dybarra@faegre.com; jintermill@faegre.com;
cdolan@faegre.com

Jay Thomas Jorgensen jjorgensen@sidley.com

Raymond Thomas Lay rtl@kiralaw.com, dianna@kiralaw.com

Krisann C. Kleibacker Lee; kkleee@faegre.com

Nicole Marie Longwell Nlongwell@@mcdaniel-lawfirm.com

Archer Scott McDaniel smcdaniel@mcdaniel-lawfirm.com

Thomas James McGeady tjmcgeady@loganlowry.com

James Randall Miller rmiller@mkblaw.net, smilata@mkblaw.net; clagrone@mkblaw.net

Charles Livingston Moulton Charles.Moulton@arkansasag.gov,
Kendra.Jones@arkansasag.gov

Indrid Moll; imoll@motleyrice.com

Robert Allen Nance rnance@riggsabney.com, jzielinski@riggsabney.com
William H Narwold bnarwold@motleyrice.com
Jonathan Orent ; jorent@motleyrice.com
George W Owens gwo@owenslawfirmpc.com, ka@owenslawfirmpc.com
David Phillip Page dpage@edbelllaw.com, smilata@edbelllaw.com
Robert Paul Redemann rredemann@pmrlaw.net, scouch@pmrlaw.net
Melvin David Riggs driggs@riggsabney.com, pmurta@riggsabney.com
Randall Eugene Rose ! rer@owenslawfirmpc.com, ka@owenslawfirmpc.com
Michael Rousseau ; mrousseau@motleyrice.com
Robert E Sanders rsanders@youngwilliams.com,
David Charles Senger dsenger@pmrlaw.net, scouch@pmrlaw.net; ntorres@pmrlaw.net
Paul E Thompson , Jr pthompson@bassettlawfirm.com
Colin Hampton Tucker chtucker@rhodesokla.com, scottom@rhodesokla.com
John H Tucker jtuckercourts@rhodesokla.com, lwhite@rhodesokla.com
Elizabeth C Ward lward@motleyrice.com
Sharon K Weaver sweaver@riggsabney.com, lpearson@riggsabney.com
Timothy K Webster twebster@sidley.com, jwedeking@sidley.com
Gary V Weeks !
Terry Wayen West terry@thewestlawfirm.com,
Edwin Stephen Williams steve.williams@youngwilliams.com
Douglas Allen Wilson Doug_Wilson@riggsabney.com, pmurta@riggsabney.com
P Joshua Wisley ; jwisley@cwlaw.com, jknight@cwlaw.com
Elizabeth Claire Xidis cxidis@motleyrice.com
Lawrence W Zeringue lzeringue@pmrlaw.net, scouch@pmrlaw.net

Also on this 18th day of September, 2007 I mailed a copy of the above and foregoing pleading to:

David Gregory Brown
Lathrop & Gage, LC
314 E. High St.
Jefferson City, MO 65101

Thomas C Green

Sidley Austin Brown & Wood LLP
1501 K ST NW
WASHINGTON, DC 20005

Cary Silverman

Victor E Schwartz

Shook Hardy & Bacon LLP (Washington DC)
600 14TH ST NW STE 800
WASHINGTON, DC 20005-2004

C Miles Tolbert

Secretary of the Environment
State of Oklahoma
3800 NORTH CLASSEN
OKLAHOMA CITY, OK 73118

/s/ M. David Riggs

M. David Riggs